NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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October 5, 2004

The Honorable Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of IP-Enabled Services, WC Docket No. 04-36

Dear Commissioner Martin:

On behalf of NCTA I would like to respond briefly to the September 13, 2004 submission of Nuvio Corporation ("Nuvio") relating to Title I regulation of broadband Internet providers. Nuvio's three-and-one-half page self-described "White Paper" is an invitation to regulate broadband Internet providers such as cable operators to assure non-discriminatory treatment for VoIP providers that might ride on the cable platform.

VoIP is an intriguing new technology that can provide competitive residential voice service. In particular, cable VoIP is the first major facilities-based competition to the incumbent service and may accomplish the sought-after goal of local phone competition envisioned by Congress and the Commission in the 1996 Act.

In making its claim, Nuvio can point to no "discrimination" against unaffiliated voice providers. Instead, Nuvio rehashes unproven arguments about the incentives of vertically integrated broadband providers to engage in discrimination against unaffiliated providers, in this case related to VoIP. Suggestions such as this have been proffered several times before to the Commission in the form of "network neutrality," the "layering approach" to the Internet. They draw their historical antecedent from the forced access debate of the 1990's.[1] Each time the proponents have failed to produce any evidence to substantiate their claims.

[1] See footnote 1 of Nuvio White Paper. And while pointing out the conditions placed on the AOL-Time Warner merger by the FTC and the FCC, Nuvio fails to point out that the one of the most talked about conditions of the merger, relating to advanced Instant Messaging, was eliminated without objection last year. Petition of AOL Time Warner Inc. for the Relief From the Condition Restricting Streaming AIHS, Memorandum Opinion and Order, FCC 03-193, rel. Aug. 20, 2003. It also neglects to mention that the Commission was asked to apply a forced access regime on cable modem service but declined to do so. See Cable Services Bureau, Federal Communications Commission, Broadband Today, A Staff Report to William E. Kennard, Chairman, Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau, Oct. 1999.

The Commission, we believe, should maintain the approach adopted in 1999 to monitor the practices of broadband service providers. But it should be equally vigilant not to impose unnecessary regulation on broadband providers, such as cable, that offer the promise of sustained facilities-based local phone competition. Going down the path of rule-heavy "discrimination," especially in the absence of any demonstrated harm – or proof that regulation would yield a desirable outcome – would be a significant policy error. Moreover, it would be at odds with the Commission's unanimous desire in this rulemaking for a less regulatory environment to foster VoIP services. And it would engulf the Commission in a new round of regulatory rulemaking to define and limit relationships that are developing in the market over time.

Attached to this letter is a copy of a 2003 NCTA letter to the Commission in CS Docket No. 02-52. There, we describe a similar complaint, in that case by Amazon.com; NCTA's letter details the pitfalls of a general ban on "discrimination" regarding emerging technologies and how such a ban becomes a tool for competitors to use the regulatory process to their advantage at the negotiating table. Like the claim by Amazon.com, Nuvio's effort is a solution in search of a problem.

Sincerely,

Daniel L. Brenner

Attachment

cc: Chairman Michael K. Powell
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Kathleen Q. Abernathy
Marlene H. Dortch, WC Docket No. 04-36

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February 21, 2003

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 02-52

Dear Ms. Dortch:

In an *ex parte* letter submitted on December 2, 2002 in the above-captioned proceeding, Amazon.com Holdings, Inc. ("Amazon.com") urges the Commission to adopt regulations to ensure that high-speed broadband Internet access customers have "unfettered access to Internet-based information, products and services." The letter echoes and expands similar requests for regulatory intervention in Amazon.com's comments, in the comments of the "High Tech Broadband Coalition," and in an *ex parte* submission of the "Coalition of Broadband Users and Innovators," to which the National Cable & Telecommunications Association ("NCTA") has already responded. And it includes a legal analysis by Amazon.com's attorneys purporting to demonstrate that the Commission has jurisdiction under Title I to impose the proposed regulations, even though cable modem service is neither a telecommunications service subject to Title II nor a cable service subject to Title VI.

In this letter, we reaffirm that cable modem customers have – and have always had – access to all lawful content on the Internet. But the regulation advocated by Amazon goes far beyond its stated objective of providing "unfettered access" and would thwart, not promote, the public interest in Internet and broadband growth, development and innovation. Moreover, nothing in the Communications Act confers jurisdiction on the Commission to adopt such regulation.

I. REGULATION WILL UNDERMINE THE PUBLIC INTEREST IN DEPLOYMENT, DEVELOPMENT AND FULL AVAILABILITY OF INTERNET CONTENT AND SERVICES.

In our comments and previous responses, NCTA specifically *agreed* "that consumer access to Internet content is, and should be, full and unfettered."[1] We strongly *disagreed,* however, that regulation was necessary or appropriate to ensure that result. We pointed out that Microsoft and other proponents of regulation have not provided any evidence that cable operators are blocking or impairing access to any Internet content. Cable operators offer access to all lawful content on the Internet because that is what our customers expect and demand. That will continue to be the case.

But if cable operators have no intention of blocking access to content, why do we object to having the government impose this as a matter of law? The answer, as we tried to make clear, is that regulation would "entangle operators in regulatory disputes and create the risk that market participants will exploit government processes to delay or hobble rivals."[2] Amazon.com's *ex parte* letter confirms that this is exactly what would occur.

Amazon.com's proposed regulation is hardly limited to ensuring that consumers have access to all Internet content. Its targets of regulation to insure "unfettered" access encompass business practices that have nothing to do with whether consumers can readily obtain the content of their choice. And its proposal, if adopted, would surely launch a spiral of regulatory disputes and mischief.

For example, under Amazon's proposed rule, it is not simply unlawful for a provider of cable modem service to block access to specific content. It is also unlawful for the provider to send to consumers who request a particular website, "[i]n *addition* to the requested Internet content, ... any *other* content, including but not limited to HTML files as 'frames' or 'pop-up boxes' beyond that requested by the user."[3]

As a general matter, there is no reason for the Commission to address the purely hypothetical issue of cable operators inserting pop-up ads on particular websites. Amazon provides no evidence, and does not even suggest, that anybody is doing or planning to do any such thing – just as it provides no evidence that any cable operators are blocking access to Internet content.

Secondly, regulation should be viewed as a last resort to deal with problems that the marketplace is unlikely to solve. In this specific case, to the extent that pop-up ads, even when inserted by the website itself, may be viewed by consumers as annoyances and provide little of value, the marketplace appears well equipped to make that determination and curtail their use or enable those consumers to avoid them.

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1 Ex Parte Letter from Robert Sachs, NCTA President and CEO, Dec. 10, 2002, p. 1.

2 *Id.*, p. 2.

3 Amazon.com Ex Parte Letter, Appendix B (emphasis added).

Thus, according to press reports, "[t]he small number of companies using pop-up ads to win the business of Web surfers are finding that they are annoying potential customers as much as attracting them. Many major online companies, such as Amazon and BarnesandNoble.com, are cutting down on the use of pop-up ads or even banning them altogether."[4] Moreover, the marketplace has made available an easy means for consumers to avoid such ads if they so choose: "[F]ree software designed to block pop-up ads has become one of the most popular downloads on the Internet."[5] And ISPs such as EarthLink and AOL are making such software available as part of their subscriber packages.[6]

Moreover, whatever one thinks about the pros and cons of these frames and boxes – and we take no position on their desirability to consumers *or* to cable operators – there is a logical disconnect in Amazon.com's suggestion that such material impermissibly restricts *access* to Internet content. Everyone agrees that consumers should have access to all lawful Internet content unless they choose otherwise. But the material barred by Amazon.com's proposed regulation would not prevent access to any website's content.[7]

Amazon.com's filing demonstrates how a regulation purporting simply to guarantee unfettered access to the Internet could be used to restrict other sorts of commercial arrangements that might be entered into between broadband service providers and content providers. Such an approach would inevitably result in uncertainty, litigation and mischief. What other commercial practices and agreements between Internet service providers and Internet content providers would similarly be challenged as "restricting" or "impairing" access to content?

This is why cable operators oppose the attempts by Microsoft, Amazon.com and others in various "coalitions" to codify their own special market advantages in the guise of what is already available, namely "unfettered access" to Internet content. Under the proposal, every effort to enhance the value of Internet access beyond the provision of a common carrier transport service is subject to potential regulatory challenge as a restraint on "unfettered access." As a result, the ability of facilities-based providers of high-speed Internet to best meet the needs and demands of consumers – and to attract investment capital – would be restricted and impaired. There is absolutely no need to impose these adverse effects of regulation in anticipation of hypothetical restrictions on access to content that have never occurred.

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4 "Pop-ups Strike Out with Internet Advertisers," *Washington Times*, Sept. 9, 2002.

5 *Id.*

6 *Id.*

7 Even Amazon.com does not suggest that additional frames and boxes generally prevent consumers from viewing their intended content, and its proposal does *not* bar all such frames and boxes. But if the additional material is based on and linked to a consumer's request for a *particular* website, Amazon.com claims it is an impairment of access to Internet content. It is understandable why Amazon.com, the largest Internet retailer, might want to prevent consumers who visit its site from also receiving information and advertising from competitors and others who might specifically want to reach those consumers. But antitrust and "unfair competition" laws and remedies are available to the extent that the provision of such materials is found to be anticompetitive and unfair rather than to promote marketplace competition. *See, e.g.*, "Publishers Settle With Gator in Fight on Pop-Up Ads," *New York Times*, Feb. 8, 2003, p. B2. ("The nation's largest newspaper publishers have settled a dispute over pop-up ads that were being placed over their Web sites without permission.")

II. THE COMMISSION LACKS JURISDICTION TO IMPOSE THE REGULATIONS PROPOSED BY AMAZON.COM.

Notwithstanding Amazon.com's arguments to the contrary, the Commission has no authority to impose regulation of the sort that Amazon.com proposes. Amazon.com provides an analysis from its attorneys purporting to show that the Commission has "ancillary jurisdiction" to impose its proposed prohibition on "Impairment of Access to Internet Content." But that analysis depends on a wholly unsupported supposition – that the regulation would somehow promote nationwide deployment of broadband capability and the market-driven development and availability of Internet services. In fact, it would do just the opposite.

Much of the legal analysis is devoted to arguing that the scope of the Commission's jurisdiction under Title I extends to cable modem service. This position is urged even though, because it is an information service that is neither a telecommunications service nor a cable service, the Communications Act does "not expressly and specifically authorize the Commission to take action."[8] But it is not at issue that cable modem service is within the scope of the Commission's Title I jurisdiction under Sections 1 and 2(a) of the Act. As NCTA acknowledged in its comments in this proceeding, "The Supreme Court made clear in *United States v. Southwestern Cable*, 392 U.S. 157, 173 (1968), that Title I of the Act gives the Commission general regulatory jurisdiction over 'all interstate . . . communication by wire or radio.'"[9]

However, as we also pointed out, "this general jurisdiction does not give the Commission unfettered authority to regulate all 'communication by wire or radio' in any manner that it chooses. To the contrary, Title I – specifically, Section 4(i) – limits the Commission's authority to 'mak[ing] such rules and regulations and issu[ing] such orders, *not inconsistent* with this Act, as may be *necessary* in the execution of its functions.'"[10]

As the United States Court of Appeals for the District of Columbia Circuit recently stated,

> "Chairman Powell's discussion of [Section 4(i)] says it all:
>
> > 'It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a "necessary and proper" clause. Section 4(i)'s authority must be "reasonably ancillary" *to other express provisions*. And, by its express terms, our exercise of that authority cannot be 'inconsistent' with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.'
>
> . . . . We agree."[11]

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[8] Amazon.com Ex Parte Letter, Appendix A, at v.

[9] NCTA Comments CS Docket No. 02-52, at 5.

[10] *Id.* (*quoting* Section 4(i), 47 U.S.C. § 154(i) (emphasis added)).

[11] *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (*quoting* Report and Order, *Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230, 15276 (2000) (Powell, dissenting) (emphasis added).

Amazon.com's legal analysis concedes that the Commission's ancillary jurisdiction to adopt specific regulations stems from Section 4(i). But it nevertheless suggests that the Commission has "broad discretion so long as its actions further the *legislative purposes for which the Commission was created* and are not contrary to *the basic statutory scheme.*"[12] As the D.C. Circuit made clear, the standard is *not* so permissive. Any regulation must be necessary to, and in furtherance of, specific *express* provisions of the Act – not mere "legislative purposes."[13] And it must not conflict with any other *provisions* of the Act, wholly apart from whether it is "contrary to the basic statutory scheme."

Amazon.com's legal analysis cites two statutory provisions– Sections 706 of the Telecommunications Act of 1996[14] and Section 230 of the Communications Act[15] – the purposes of which would allegedly be furthered by the proposed regulation. The proposed regulation would not promote the Commission's mandates under either of those provisions, however. To the contrary, it would be directly inconsistent with both provisions.

Section 706. The analysis devotes a single paragraph to assert that the proposed regulation is somehow useful and necessary to fulfill the Commission's responsibilities under Section 706. Section 706's mandate is to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability . . . by . . . regulatory forbearance, measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment."[16]

First of all, the Commission has repeatedly found, in its periodic Section 706 reports, that advanced telecommunications capability *is* being deployed on a reasonable, timely basis. Second, as explained below, the proposed regulation would *impede* deployment of broadband telecommunications facilities and capability. Third, the proposed regulation obviously does not involve the use of "regulatory forbearance." Fourth, its use of regulation to prohibit restrictions on access to Internet content – and to prohibit certain marketplace commercial arrangements – does nothing to promote competition "in the local telecommunications market." Fifth, it is a mystery – which the Amazon.com analysis makes no effort to explain – how the proposed restrictions on facilities-based providers can conceivably "remove barriers to infrastructure investment."

The proposed regulation would have an effect on investment in and deployment of advanced telecommunications infrastructure and capabilities – an effect directly *contrary* to the one the Commission is supposed to promote. The costs and uncertainty of regulation and the

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[12] Amazon.com Ex Parte Letter, Appendix A at ix (quoting Decision and Order, *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 96 F.C.C. 2d 781, 787 n.15 (1984) (emphasis added).

[13] Thus, as NCTA stated in its comments, "[a]ny regulation must be necessary to achieve one of [the Commission's] enumerated mandates. And it must not be inconsistent with any policy or provision of the Act." NCTA Comments, CS Docket No. 02-52, at 6, citing United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

[14] Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes at 47 U.S.C. § 157 ("Section 706").

[15] 47 U.S.C. § 230.

[16] Section 706(a).

prohibition on otherwise benign marketplace arrangements would *discourage* investment and deployment and distort competitive marketplace outcomes. Section 706 provides no basis for exercising ancillary jurisdiction; it is one reason why the Commission may *not* exercise such jurisdiction.

Section 230. Similarly, nothing in Section 230 supports ancillary jurisdiction, and, indeed, the exercise of such jurisdiction is directly at odds with that section. Section 230 establishes national policies of "promot[ing] the continued development of the Internet and other interactive computer services and other interactive media" and "preserving the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*"[17]

Amazon.com's legal analysis flatly asserts that its proposed regulation would promote the federal policies established in Section 230, but it offers no evidence or reason to believe that this is the case. As discussed above, the uncertainty and marketplace distortions that would result from regulation would be more likely to *deter* investment in and deployment of Internet facilities and services and thus be *inconsistent* with the federal policies of Section 230.

Amazon.com's proposed regulation would also be flatly inconsistent with the federal policy mandate that the marketplace for Internet and interactive computer services should be "unfettered by Federal and State regulation." Section 230 gives the Commission *no regulatory functions* and establishes a policy that the Internet *should not be regulated.* It is hard to imagine how this section could possibly provide a basis for the ancillary jurisdiction that the Commission would need to regulate in the manner proposed by Amazon.com.

Title VI. Finally, Amazon.com's legal analysis also suggests that Title VI of the Communications Act and its general purposes somehow confer ancillary jurisdiction on the Commission to adopt the proposed regulation. We showed in our comments why Title VI cannot provide a basis for regulating cable modem service.[18] As we pointed out, Congress specified in the Cable Communications Policy Act of 1984, which added Title VI to the Communications Act, that Title VI was not meant to affect in any way the Commission's jurisdiction to regulate non-cable services. To the contrary, Section 3(b) of the 1984 Act provides that

> [t]he provisions of this Act and amendments made by this Act shall not be construed to affect any jurisdiction the Federal Communications Commission may have under the Communications Act of 1934 with respect to any communication by wire or radio (other than cable service, as defined in section 602(5) of such Act) which is provided through a cable system, or persons or facilities engaged in such communications.[19]

Thus, according to its legislative history, the 1984 Act was intended to "preserve[] the regulatory and *jurisdictional status quo* with respect to non-cable communications services."[20]

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[17] 47 U.S.C. § 230 (emphasis added). This analysis recalls the remarks of Chairman Powell quoted by the D.C. Circuit, *supra*. Like § 4(i), § 230 does not create functions that do not otherwise exist.

[18] *See* NCTA Comments, CS Docket No. 02-52, at 11-12.

[19] Pub. L. No. 98-549, § 3, Oct. 30, 1984, 98 Stat. 2779, reproduced in the notes under 47 U.S.C. § 521.

[20] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 29 (1984) (emphasis added).

The Commission cannot derive ancillary jurisdiction to regulate non-cable services provided over cable systems from a statutory provision when Congress specifically enunciated that is was to have no jurisdictional effect on such services.

CONCLUSION

Cable consumers have – and have always had – full access to Internet content. Regulation of the sort proposed by Amazon.com that purports to prohibit restrictions on such access would inevitably be used to thwart legitimate business practices and arrangements that have nothing to do with blocking access to content. These efforts would deter investment and innovation in the provision of high-speed Internet services. Moreover, nothing in the Communications Act gives the Commission authority to impose such regulation.

Respectfully submitted,

/s/ Daniel Brenner

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